

United States Court of Appeals for Veterans Claims INTERNAL OPERATING PROCEDURES

Preamble

The Court was created by an Act of Congress on November 18, 1988. A portion of that Act, 38 U.S.C. § 7264, provides: "The proceedings of the Court of Veterans Appeals shall be conducted in accordance with such rules of practice and procedure as the Court prescribes."

These internal operating procedures are thus adopted and promulgated for information, instruction, and guidance. Nothing in these internal operating procedures confers any rights or obligations upon parties or individuals, or the judges, the Clerk, the law clerks, or the staff of the Court, except where mandated by statute or by a judicial decision binding upon this Court.

The Court may, upon its own initiative, amend or otherwise modify these internal operating procedures.

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I. SCREENING PROCESS

(a) Duties of the Central Legal Staff.

- (1) After a Notice of Appeal is filed with the Clerk of the Court, the record on appeal transmitted, and the briefs submitted, the Public Office sends the case file to CLS, which provides an initial evaluation of the case and a memorandum recommending a particular disposition. The memorandum, briefs, record, and any other pertinent documents are sent to the screening judge for action.
- (2) CLS is encouraged to hold conferences with the parties where to do so will promote efficient identification and resolution of the issues and the content of the record.

(b) Duties of the Screening Judge.

- (1) Under 38 U.S.C. § 7254(b), the Court may hear cases by judges sitting alone, in panels, or en banc, as determined by the standards and procedures of the Court.
- (2) A case is assigned for screening to the motions judge on that case or, if there is none, on a rotational basis according to a roster managed by the Clerk.
- (3) Screening judges review cases and decide how a particular case will be set for the calendar. A case may be calendared by the screening judge for single-judge or panel disposition. Calendaring instructions are sent to the Clerk for entry into the calendar when the judge has made a decision. A request that the case be reviewed en banc may also be made by the screening judge at this time and referred to the Clerk for consideration by the other judges.
- (4) If the screening judge determines that a case is appropriate for single-judge disposition, the screening judge assumes responsibility for the decision.
- (5) If the screening judge determines that the case is appropriate for panel consideration, the judge requests that the Clerk create a panel composed of the screening judge and two additional judges.

II. SINGLE-JUDGE ACTION

(a) Policy. An opinion is issued only by a panel. A single judge affirming, reversing, remanding, or dismissing a case issues an order or memorandum decision.

(b) Standard. The Court has adopted the standard enumerated in *Frankel v. Derwinski*, 1 Vet.App. 23 (1990), to decide whether decisions appealed from the Board of Veterans' Appeals should be decided by a panel or by the screening judge. If the screening judge determines that the case

- (1) does not establish a new rule of law;
- (2) does not alter, modify, criticize, or clarify an existing rule of law;
- (3) does not apply an established rule of law to a novel fact situation;
- (4) does not constitute the only recent, binding precedent on a particular point of law within the power of the Court to decide;

- (5) does not involve a legal issue of continuing public interest; and
- (6) the outcome is not reasonably debatable,

the decision of the BVA may be affirmed, reversed, or remanded on motion by either party, or on the Court's own initiative, by a single-judge order or memorandum decision. This standard is applied to other matters presented to a judge for decision.

- (c) **Procedure.** A screening judge who determines that the case is appropriate for single-judge disposition assumes responsibility for the case and issues an order or memorandum decision. The screening judge circulates the order or memorandum decision (except one dismissing a case for failure to pay the filing fee or to file a brief) to all judges for review and comment and, if it is to be published, to the Editor for format and style review. Within 5 working days, any editorial comments are sent to the author judge, any substantive comments or requests for panel consideration are sent to all judges, and any request for en banc consideration is sent to the Senior Staff Attorney with copies to all judges.

At any time before issuance of a dispositive order or memorandum decision, the screening judge may make a new screening decision under I(b) and request panel consideration with or without oral argument. If two judges request panel consideration, the screening judge requests that the Clerk create a panel composed of the screening judge and two additional judges. If any judge requests en banc consideration, CLS follows the procedure in V(a)(3). Otherwise, the screening judge forwards a reproducible hard copy of the final order or memorandum decision to the Editor as soon as possible after the comment time has expired and comments have been considered, followed by a disk version if the action is to be published in the reporter or the electronic media.

- (d) **Reconsideration.** If a party moves for reconsideration of a single-judge dispositive order or memorandum decision, the motion is referred for CLS evaluation and preparation of a draft action for the deciding judge, who denies the motion or grants it and reconsiders the matter.

(e) **Review.**

- (1) Review of a single-judge action is undertaken only upon the direction of the Court, on its own initiative or upon the motion of a party. Otherwise, the decision of the judge becomes the decision of the Court. Any motion by a party for review of a single judge's decision is referred for CLS evaluation and circulation of a vote sheet to a panel.
- (2) Selection of a panel for review is made in accordance with panel selection procedures, except that a panel considering a motion challenging a judge's refusal to recuse himself does not include that judge unless required by the rule of necessity. An order announcing the composition of a panel for review is not issued, unless it is assigned to consider a motion challenging a judge's refusal to recuse himself.

- (f) **Panel Referrals in Pro Se Cases.** When a determination is made, at any point during the consideration of a case, that a case in which a party is not represented should be disposed of by other than a single judge, a clerk's order, designated for electronic publication only, will be entered stating that such a determination has been made and that the matter will be stayed for 30 days to permit possible arrangements for representation of that unrepresented party. In addition, the screening judge assigned to the case may direct that the participation of amicus curiae,

notwithstanding the stay, be invited in the clerk's order.

III. PANEL PROCESS

(a) Forming Panels, Disclosure of Panel Judges.

- (1) Panels are selected by the Clerk, at the request of the assigned judge. Panels consist of the assigned judge and two other judges, selected by the Clerk at random with due regard to each judge's workload or availability. The Clerk provides copies of the docket, the record, the briefs, the screening judge's calendaring instructions, and CLS memoranda to the other panel members.
- (2) The names of the panel members are made public. Publication of the names of the panel members does not guarantee that the composition of the panel will remain the same. Subsequent facts discovered may cause a judge to recuse himself; illness or other factors may require a change in the original composition of the panel. Substitution is made by the Clerk at random, with due regard to workload or availability.

(b) Oral Argument.

- (1) Oral argument is allowed when ordered by the Court. Normally, oral argument is heard only by a panel of three judges upon the request of any judge. Exceptions may be made as circumstances require. Only the Court, sitting en banc, orders or grants a request for oral argument en banc.
- (2) Each party is usually allowed thirty minutes in which to make argument. The panel makes any changes it desires in the format or order for presentation of argument, including the time allowed, limiting the argument to certain issues, or altering the usual order of presentation. The Clerk may also advise the parties of additional issues any member of the panel wishes addressed at oral argument.
- (3) After oral argument is heard, the senior judge of the panel convenes a conference to discuss and tentatively decide the case. At the conference, the senior judge in the majority assigns authorship responsibility for the opinion.

(c) Panel Disposition Without Oral Argument.

- (1) If a panel determines that a case that was originally set for oral argument should be removed from the calendar and disposed of at a conference, the Clerk issues an order notifying the parties of that decision.
- (2) If a case is to be decided without oral argument, the senior judge on the panel, after consultation with the other panel judges, sets the conference date at which time the tentative decision will be made. The senior judge in the majority assigns authorship responsibility for the opinion.

- (d) **Dissolving Panels.** If the panel members agree that the issues before the panel meet the standard enumerated in *Frankel v. Derwinski*, 1 Vet.App. 23 (1990), the screening judge, on behalf of the panel, notifies the Clerk, who issues an order revoking the panel assignment and returning the case to the screening judge.

IV. POST-PANEL PROCESS

(a) **Panel Action, Dissent, and Concurrence.**

- (1) The author judge, assigned under III(b)(3) and (c)(2), circulates a draft opinion, memorandum decision, or order within the panel for comment. A panel member who plans to write a concurrence or dissent notifies the other panel members promptly and circulates it within the panel as soon as practicable.
 - (2) The author judge circulates the final product of the panel, including any concurrence or dissent, to all judges for review and comment and to the Editor for format and style review. Within 5 working days, any editorial comments are sent to the author judge, any substantive comments are sent to all judges, and any request for en banc consideration is sent to the Senior Staff Attorney with copies to all judges.
 - (3) Unless action is pending on an en banc request, the author judge forwards a reproducible hard copy and a disk copy of the final opinion, memorandum decision, or order, with any concurrence or dissent, to the Editor as soon as practicable after the comment time has expired and comments have been considered.
- (b) **Reconsideration.** If a party moves for reconsideration of a panel action, the motion is referred for CLS evaluation and preparation of a draft action for the panel, which denies the motion or grants it and reconsiders the action.
- (c) **Review.** Any motion by a party for review of a panel decision by the Court en banc is processed in accordance with en banc procedures.
- (d) **Remand.** In the interests of judicial efficiency, if a case has been remanded, a new appeal from the BVA decision on remand is referred, when action by a judge is required, to the judge who authored the remand decision and, when a panel is required, to the panel (if any) that considered the pre-remand appeal. However, if the author judge finds the new appeal is substantially different from the one remanded, he returns it to the Clerk for routine assignment and processing.

V. EN BANC PROCESS

(a) **Procedure.**

- (1) An appeal or a petition for an extraordinary writ is considered, a panel decision is reviewed, and oral argument is held, by the Court sitting en banc only when at least half of the judges in active service agree to do so.

- (2) If a party moves for en banc consideration of a case or for review en banc, CLS (which manages the en banc process for the Clerk) circulates the motion with a vote sheet.
 - (3) If en banc consideration or review is requested by three judges, CLS circulates a vote sheet to all judges with a memorandum from at least one of the requesting judges detailing the rationale for en banc consideration or review. If fewer than three judges make a request for en banc consideration or review within five days of the request by one judge, the case shall proceed to disposition and no docket notation of the request shall be made and no statement supporting the failed request shall be accepted by the Clerk for filing and publication. If at least half of the judges do not vote to grant the request, it is denied, and no order is issued unless it is requested by three judges.
 - (4) If en banc consideration or review is ordered, the Chief Judge notifies the Clerk, who issues an order assigning the case to the full Court. The Chief Judge usually convenes a conference or directs the Clerk to schedule oral argument. The senior judge in the majority assigns authorship responsibility for the opinion of the Court en banc.
 - (5) The opinion or order is circulated to all the judges for comment, concurrence, or dissent, and to the Editor for format and style review. A judge who plans to write a concurrence or dissent notifies the other judges promptly and circulates it as soon as practicable. Within 5 working days, any editorial comments are sent to the author judge and any substantive comments are sent to all judges. The author judge forwards a reproducible hard copy and a disk copy of the final opinion or order, with any concurrence or dissent, to the Editor as soon as practicable after the comment time has expired and comments have been considered. All en banc opinions or orders are published.
- (b) **Standard.** En banc consideration, or review of a panel decision en banc, is not favored and will be ordered where it is necessary to secure or maintain a uniformity of the Court's decisions or to resolve a question of exceptional importance.

VI. PUBLICATION OF COURT ACTIONS

- (a) **Policy.** All dispositive panel actions are "published" (sent to the publisher for the Veterans Appeals Reporter and to WESTLAW and LEXIS). All nondispositive panel actions and all single-judge dispositive actions are designated, at a minimum, for electronic publication. Single-judge nondispositive actions are sent only to the parties unless they are designated for some form of publication.
- (b) **Designation.** Designation of an action of the Court for publication is made by any judge who participated (as a single judge, a panel member, or a nonsitting judge who called for en banc consideration) in that action. Designation of a single-judge action for publication in the Veterans Appeals Reporter is preceded by circulation of a justification statement to the nonsitting judges.

VII. MOTIONS

- (a) **Action by the Clerk.** The Clerk disposes of uncontested or routine procedural motions as determined by the Court.

(b) Action by the Court.

- (1) If a motion requiring the Court's decision is filed in a case that is not yet before a panel or a screening judge, the Public Office sends the motion to CLS, which researches the issue and prepares a draft order. The motion is then sent to the judge who has acted on a previous motion in that case or, if none, who is next in rotation. The judge reviews the motion and either signs the draft order or makes appropriate changes.
- (2) If a motion requiring the Court's decision is filed in a case that is before a panel or a screening judge, the Clerk sends it directly to that panel or screening judge for disposition. A copy of the motion is sent to CLS for information. The author judge or, if none, the screening judge proposes action on such motions; however, the judge may request that CLS research the issue and prepare a memorandum or draft order. The judge then circulates the final order to the panel members before issuance.

VIII. PETITIONS FOR EXTRAORDINARY WRITS

- (a) Authority.** In addition to its appellate jurisdiction, the Court has the authority, under the All Writs Act, 28 U.S.C. § 1651(a), to issue all writs necessary or appropriate in aid of its jurisdiction. *See Erspamer v. Derwinski*, 1 Vet.App. 3 (1990), *appeal dismissed per agreement of the parties*, No. 90-7001 (Fed. Cir. June 28, 1990).

(b) Procedure.

- (1) If a petition seeks an extraordinary writ (e.g., mandamus, prohibition, etc.), the appropriate case file is sent to CLS for evaluation and preparation of a draft action. If the petition is related to a case already acted upon by a judge or a panel, the petition is assigned to that judge or panel. If the petition constitutes a new matter, it is assigned by the Calendar Clerk on a rotational basis to a judge for screening.
- (2) A petition for an extraordinary writ is granted only by a panel. A judge denies the petition or refers it to the Clerk for the creation of a panel consisting of that judge and two additional judges, selected at random with due regard to workload or availability. Before referring the petition to the Clerk, the screening judge may order that a response be filed by the appropriate party.

IX. APPLICATIONS FOR ATTORNEY FEES AND EXPENSES

- (a) Procedure.** After the filing of an application pursuant to 28 U.S.C. § 2412 for award of attorney fees and expenses, the Secretary's response, and any reply, the Public Office sends the case file to CLS. CLS provides an initial evaluation and a memorandum recommending a particular disposition of the application. CLS sends copies of the memorandum, application, response, reply, and any other pertinent documents through the Calendar Clerk to a judge or panel, as appropriate, for action.
- (b) Judge or Panel Assignment.** If no judge had acted on the underlying appeal, the Calendar Clerk assigns a judge on the rotational basis provided for in I(b)(2). If a single judge or a panel had acted on the appeal at any time, the application is assigned to that judge or panel. If the single

judge requests a panel, the Clerk draws the remainder of the panel at random with due regard for workload and availability.

- (c) **Bifurcated Applications.** In the interest of judicial efficiency, if some but not all issues in a case have been disposed of and a judgment has been entered, a timely application pursuant to 38 U.S.C. § 2412 for attorney fees and expenses regarding those issues normally will be held in abeyance until all issues on appeal have been resolved and an application for attorney fees and expenses for the remainder of the appeal is timely received, or the time for such an application has elapsed. This does not prevent the parties from settling the initial application without judicial intervention.

X. BOARD OF JUDGES MEETINGS

The board of judges meets at the call of the Chief Judge or any three associate judges. Unless excused by the Chief Judge, the Clerk attends such meetings.